Ching Yew Chye & Ors v Pavitar Singh a/l Manjeet Singh & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12ANCVC-47–03 OF 2017
FAIZAH JAMALUDIN JC
17 NOVEMBER 2017

Civil Procedure — Summary judgment — Application for — Interpretation of sale and purchase agreement — Vacant property allowance — Terms agreed between parties — Whether claim came within O 14 r 1 of the Rules of Court 2012 — Whether applicant met preliminary requirements for proceeding under O 14 r 2 — Whether there were issues or questions to be tried

The appellants ('the plaintiffs') were the shareholders of all the issued and paid-up share capital of Plato-Straits Heritage Sdn Bhd ('the company') which was the registered lessee of eight pieces of land. By way of a sale and purchase agreement between the plaintiffs and the respondents ('the defendants'), the plaintiffs sold the issued and paid-up share capital of the company ('the sale shares'). Dispute arose on the vacant property allowance for the lease property. According to the the plaintiffs: (a) the defendants agreed to take over the company on an 'as is where is basis'; (b) the defendants' lawyers did not deny the contents of the plaintiffs' letter which confirmed the agreement between the parties that the assessment charges for the vacant period will only be reimbursed by the defendants to the plaintiff when DBKL refunds the assessment charges by way of the vacant property allowance for the respective periods; and (c) the defendants were estopped from denying that the defendants had agreed to and were liable to reimburse the plaintiffs all the assessments charges paid for the vacant period which was refunded by DBKL through the vacant property allowance. Subsequently, the plaintiffs applied for summary judgment at the sessions court under O 14 of the Rules of Court 2012. The application was dismissed and so was the appeal against it at the High Court. Hence, the present appeal.

Held, allowing the appeal:

(1) This was a simple case of interpretation of the SPA. Pursuant to basic accounting principles, the vacant property allowance was an asset of the company. It was clear from the plain and ordinary meaning of the SPA, the parties had agreed that the defendants, at completion of the SPA, would take the business of the company free from all assets and liabilities save for lease and the lease property (see para 49).

(2) The law on summary judgment under O 14 r 1 of the Rules of Court

2012 is well settled. In every application under O 14, once it is established that the claim come within O 14 r 1 and the plaintiff has met the preliminary requirements for proceeding under O 14 as set out in O 14 r 2, the burden shifts to the defendant to satisfy the court that there was an issue or question to be tried with respect to the claim. The plaintiffs have satisfied the preliminary requirements and that the application comes within O 14. The burden therefore fell on the defendants to satisfy the court that there was a triable issue in relation to the plaintiffs' claim (see paras 46–47).

(3) The defendants failed to raise any triable issue. It was unfortunate that the defendants' counsel, in trying to persuade this court that there were triable issues in relation to the plaintiffs' claim, chose to muddy the waters by raising red-herrings (see paras 48 & 50).

[Bahasa Malaysia summary

Perayu-perayu ('plaintif-plaintif') adalah pemegang saham semua modal saham terbitan dan berbayar Plato-Straits Heritage Sdn Bhd ('syarikat') yang merupakan pemajak berdaftar lapan bidang tanah. Melalui satu perjanjian jual beli antara plaintif-plaintif dan responden-responden ('defendan-defendan'), plaintif menjual modal saham terbitan dan berbayar syarikat tersebut ('saham jualan'). Pertikaian timbul mengenai elaun hartanah kosong bagi hartanah pajakan. Menurut plaintif-plaintif: (a) defendan-defendan bersetuju mengambil alih syarikat itu dengan 'sebagaimana asasnya'; (b) peguam defendan-defendan tidak menafikan kandungan surat plaintif-plaintif yang mengesahkan perjanjian antara pihak-pihak bahawa caj penilaian untuk tempoh kosong hanya akan dibayar balik oleh defendan-defendan kepada plaintif apabila DBKL membayar balik caj penilaian melalui elaun hartanah kosong untuk tempoh masing-masing; dan (c) defendan-defendan diestop daripada menafikan bahawa defendan-defendan bersetuju dan bertanggungan untuk membayar balik plaintif-plaintif semua caj penilaian yang dibayar untuk tempoh kosong yang telah dipulangkan oleh DBKL melalui elaun hartanah kosong. Seterusnya, plaintif-plaintif memohon penghakiman ringkas di mahkamah sesyen di bawah A 14 Kaedah-Kaedah Mahkamah 2012. Permohonan tersebut ditolak dan rayuan terhadapnya di Mahkamah Tinggi juga ditolak. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Ini satu kes ringkas tafsiran PJB. Menurut prinsip perakaunan asas, elaun hartanah kosong adalah aset syarikat. Jelas daripada makna biasa dan semulajadi PJB bahawa pihak-pihak telah bersetuju bahawa defendan, setelah selesai PJB, akan mengambil perniagaan syarikat itu bebas daripada semua aset dan liabiliti kecuali untuk pajakan dan harta pajakan (lihat perenggan 49).

(2) Undang-undang mengenai penghakiman ringkas di bawah A 14 k 1 Kaedah-Kaedah Mahkamah 2012 adalah matan. Dalam setiap permohonan bawah A 14, sebaik sahaja terbukti bahawa tuntutan tersebut terjumlah bawah A 14 k 1 dan plaintif telah memenuhi keperluan awal untuk meneruskan bawah A 14 seperti yang dinyatakan dalam A 14 k 2, beban tersebut beralih kepada defendan untuk memuaskan mahkamah bahawa terdapat isu atau persoalan untuk dibicarakan berkenaan tuntutan tersebut. Plaintif-plaintif telah memenuhi pra-syarat dan permohonan ini terjumlah bawah A 14. Oleh itu, beban adalah pada defendan-defendan untuk memuaskan mahkamah bahawa terdapat isu untuk dibicarakan berkaitan dengan tuntutan plaintif-plaintif (lihat perenggan 46–47).

(3) Defendan-defendan gagal menimbulkan isu yang boleh dibicarakan. Malang sekali bahawa peguam defendan-defendan, dalam usaha memujuk mahkamah ini bahawa ada isu-isu yang berkaitan dengan tuntutan plaintif, memilih untuk mengeruhkan keadaan dengan membangkitkan fakta-fakta yang menyimpang (lihat perenggan 48 & 50).]

Notes

For cases on application for summary judgment, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9868–9950.

Cases referred to

Bank of Credit and Commerce International SA v Munawar Ali [2001] 1 All ER 961; [2002] 1 AC 251, HL (folld)

In-Fusion Solutions Sdn Bhd v UNITAR Capital Sdn Bhd [2016] 11 MLJ 667; [2015] 1 LNS 280, HC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (refd)

Percetakan Kolombong Ria Sdn Bhd v Wawasan Iktisas Sdn Bhd [2016] 6 MLJ 584; [2017] 4 CLJ 302, CA (folld)

Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt [2016] 5 MLJ 220, CA (distd)

Legislation referred to

Evidence Act 1950 s 2
Rules of Court 2012 O 14, O 14 rr 1, 2

Gan Siew Guat (Azri Chuah & Yap) for the plaintiff.
Balan Nair Thamodaran (Thomas Philip) for the defendants.

Faizah Jamaludin JC:

INTRODUCTION

[1] This is the appellants'/plaintiffs' appeal to the High Court against the decision of the sessions court judge in dismissing the plaintiffs' application for summary judgment under O 14 of the Rules of Court 2012 ('the ROC').

[2] The dispute between the plaintiffs and the defendants relates to the vacant property allowance ('vacant property allowance') for the lease property, which is a refund by the Dewan Bandaraya Kuala Lumpur ('DBKL') of the assessment charges paid by the company to DBKL for the lease property for the period of 1 January 2014–30 June 2015.

[3] The plaintiffs and the defendants pursuant to the sale and purchase agreement between them had agreed for the plaintiffs to sell and the defendants to buy all the shares in the company and for the defendants to take over the business of the company on the completion date on 'as is where is basis' free from all assets and liabilities save for the rights, liabilities and interests in connection with the lease and the lease property.

[4] For the reasons set-out in these grounds of judgment, I found that based on elementary accounting principles the vacant property allowance is an account receivable due to the company. As a receivable, the vacant property allowance is an asset of the company. Therefore, pursuant to the terms of the sales and purchase agreement, the plaintiffs are entitled to the vacant property allowance prior to completion of the sale and purchase agreement. Accordingly, I allowed the plaintiffs' appeal and ordered that the decision of the sessions court judge be set-aside and that summary judgment be entered against the defendants.

[5] The appellants and the respondents are referred herein as they were referred to in the sessions court, namely as plaintiffs and defendants respectively.

FACTS

[6] The plaintiffs are the shareholders of all the issued and paid-up share capital of Plato-Straits Heritage Sdn Bhd (Company No 785310-V) ('the company').

[7] The company is the registered lessee of eight pieces of land held under Geran 12941 Lot 152, Geran 12942 Lot 153, Geran 12943 Lot 154, Geran 12944 Lot 162, Geran 12945 Lot 163, Geran 12946 Lot 164, Geran 12947

Lot 165 and Geran 10980 Lot 166, all in Seksyen 49, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan KL and the building thereon known as Wisma Char Yong bearing the postal address No 89 Jalan Ampang, 50450 Kuala Lumpur ('the lease property') pursuant to a lease agreement dated 5 October 2011 ('the lease') between the company and Persatuan Char Yong Selangor dan Wilayah Persekutuan ('the lessor') as the lessor/registered proprietor.

[8] By a sales and purchase agreement between the plaintiffs and the defendants dated 6 April 2015 ('the SPA') the plaintiffs agreed to sell to the defendants and the defendants agreed to purchase from the plaintiffs all the issued and paid-up share capital of the company ('the sale shares') for the sum of RM9,918,830 subject to the terms and conditions contained in the SPA.

STRUCTURE AND SALIENT TERMS OF THE SPA

[9] The company is the registered lessee of the lease property pursuant to the lease with the lessor. The lease property is leased to the company for 60 years from 5 October 2011–4 October 2071.

[10] It is clear from the plain and ordinary reading of the SPA that the transaction between the parties was structured such that the plaintiffs sell the sale shares in the company to the defendants in order to transfer the rights, interests and liabilities in the lease and lease property from the plaintiffs to the defendants. The alternative structure would have instead been for the company to sell its rights, interests and liabilities directly under the lease and the lease property to the defendants. This would have entailed the company having to terminate the lease and the defendants having to enter into a new lease agreement directly with the lessor for the lease property.

[11] Based on the existing structure of the transaction between the parties and pursuant to the terms of SPA, on completion of the SPA, the business of the company and the company's rights, titles, interests, liabilities and obligations in respect of the lease and the lease lroperty transfers to the defendants. All other pre-completion assets and liabilities remain with the plaintiffs and will not transfer to the defendants. This is clear from the provision in cl 5.3.1(b) of the SPA reproduced below.

[12] The salient terms of the SPA for purposes of this suit are as follows:

4.2 Payment of the Purchase Price

4.2.1 The Purchase Price shall be paid by the Purchasers as follows:

(a) in consideration of the sellers agreeing on the request of the purchasers to extended payment period, the sum of Ringgit One Million Two Hundred

Seventy Seven Thousand Eight Hundred and Twenty Four And Sen Fifty Only (RM1,277,824.50) (referred to as the 'balance deposit') (and which together with the earnest deposit totals Ringgit Malaysia One Million Four Hundred Eighty Seven Thousand Eight Hundred And Twenty Four And Sen Fifty only (RM1,487,824.50) (referred to as the 'deposit') being equivalent to fifteen percent (15%) of the purchase price), shall be paid by the purchasers to the sellers' solicitors as stakeholder on the purchasers' execution of this agreement; and

(b) the balance sum of Ringgit Malaysia Eight Million Four Hundred Thirty One Thousand And Five And Sen Fifty only (RM8,431,005.50) being equivalent to eighty five percent (85%) of the purchase price (referred to as the 'balance purchase price') shall be paid by the purchasers to the sellers' solicitors within four (4) months from the date hereof and failing which there will be an automatic extension of one (1) month subject to the purchasers paying to the sellers late payment interests at the agreed simple interest rate of eight percent (8%) per annum calculated on a daily basis on the balance sum or unpaid balance thereof, as the case may be, as agreed reasonable compensation for the delay on payment (referred to as 'payment period').

5.1 *When Completion Takes Place*

Completion shall take place on such day within five working days from the date the sellers' solicitors are in receipt in full of the balance purchase price and all other moneys payable by the purchasers to the sellers in accordance with the terms and conditions of this agreement (referred to as the 'completion date').

5.3 *Upon Completion*

5.3.1 The parties agree that upon the fulfilment of the obligation of the sellers in clause 5.2(a) above and of the purchasers in clause 5.2.1(b) above ... the sale and purchase of the sale shares is and shall for all purpose whatsoever be deemed completed AND the legal and beneficial ownership of the sales shares shall be deemed transferred to the purchasers. For the avoidance of doubt, the parties agree that with effect from and including the completion date: —

(a) all risks and benefits in respect of the sale shares shall pass and accrue to the purchasers; and

(b) the purchasers *shall take over the business of the company* on an 'as is where is basis' *as at the completion date free from all assets and liabilities whatsoever save and except* the rights, title and interests in connection with the lease registered in the name of the company as lessee and such liabilities and obligations in respect of the lease and lease property effective from and including the completion date. All land and properties whatsoever shall be accepted by the purchasers on an 'as is where is basis' and in its nature, state and condition as at the completion date subject to all tenancies, lease, licence etc. which may exist over or bind such land or properties. The sellers make no warranty or representation as to the nature, state and condition (including vacant possession) of any land or property whatsoever.

6. *Outgoings*

6.1 All and any assessment charges, quit rent charges, lease payments payable to the lessor, cost of insurance taken out by the company in respect of the lease property, electricity charges, water charges, Indah Water Konsortium Sdn Bhd charges and all other rates, taxes, charges and outgoings whatsoever imposed on or in connection with the lease and/or lease property shall be apportioned between the purchaser and the sellers as at the date of full payment of the purchase price.

6.2 The purchasers shall simultaneously with the payment of the purchase price, reimburse the sellers all deposits paid to any authority or relevant body in respect of such outgoings ... (Emphasis added.)

DISPUTE BETWEEN THE PLAINTIFFS AND THE DEFENDANTS

[13] The dispute between the plaintiffs and the defendants relates to the vacant property allowance for the lease property for the period of 1 January 2014–30 June 2015 ('vacant period').

[14] The company prior to the date of the SPA had applied to DBKL for the vacant property allowance, which is a refund by DBKL of the assessment charges paid for the vacant period, on the grounds that the lease property was unoccupied during the year 2014 and the first-half of 2015.

[15] Details of the company's applications for the vacant property allowance are as below:

DATE OF APPLICATION LETTER	PERIOD OF ASSESSMENT
10 January 2014	Company's letter to DBKL applying for vacant property allowance for period between 1 January 2014–30 June 2014 (first half of 2014).
10 July 2014	Company's letter to DBKL applying for vacant property allowance for period between 1 July 2014–31 December 2014 (second half of 2014).
9 January 2015	Company's letter to DBKL applying for vacant property allowance for period between 1 January 2015–30 June 2015 (first half of 2015).

A THE PLAINTIFFS' CASE

[16] The plaintiffs' case is that the defendants had agreed to take over the company on an 'as is where is basis' as at the completion date free from all assets and liabilities save and except for the rights, title and interests in connection with the lease over the lease property and that all the company's outgoings are to be apportioned between the plaintiffs and the defendants as at the date of the full payment of the purchase price.

[17] The plaintiffs aver that neither the defendants' lawyers nor the defendants had at any time denied the contents of the plaintiffs' lawyers letter dated 10 September 2015 ('10 September 2015 letter') which confirmed the agreement between the parties that the assessment charges for the vacant period will only be reimbursed by the defendants to the plaintiff when DBKL refunds the assessment charges by way of the vacant property allowance for the respective periods. The plaintiffs also state that the defendants have never denied the contents of the plaintiffs' demand for the reimbursement of the vacant property allowance for the vacant period in the letters from the plaintiffs' lawyers to the defendants' lawyers.

[18] The plaintiffs submit that the defendants are estopped from denying that the defendants had agreed to and are liable to reimburse the plaintiffs all the assessments charges paid for the vacant period which was refunded by DBKL through the vacant property allowance. The plaintiffs say that based on the understanding that the defendants would reimburse the assessments charges paid for the vacant period when the same was refunded by DBKL to the company, the plaintiffs had proceeded to accept the payment of the apportionment of the company's outgoings for the sum of RM237,587.65, which didn't include assessments charges paid for the vacant period, and to affect the transfer of the sale shares to the defendants.

THE DEFENDANTS' CASE

[19] The defendants' case is that the defendants do not owe the plaintiffs for the vacant property allowance for the vacant period because the vacant property allowance was paid by DBKL to the company and not the plaintiffs. The company and the plaintiffs are separate legal entities; and that the obligation to pay quit rent, rates and assessment pursuant to the lease agreement lies with the company and not the plaintiffs personally.

[20] The defendants argue that cl 6.1 of the SPA does not cover payments made by the company to third parties under the lease agreement and that cl 6.1 only refers to apportionment of payments made or payable by the appellants between the date of signing the SPA and the date of completion.

[21] The defendants further argue that cl 6.1 does not create any additional rights to the plaintiffs to claim for reimbursement of payments made prior to the signing of the SPA and that cl 6.2 allows for a reimbursement on all deposits paid only.

ANALYSIS AND DECISION

[22] As stated in the introduction above, the dispute between the parties is whether the plaintiffs as the seller of the sale shares under the SPA is entitled to the vacant property allowance paid to the company after completion of the SPA.

[23] With respect to learned counsel for the defendants, the issue here is not whose obligation is it to pay the assessment charges to DBKL and to whom the vacant property allowance was paid to. It also does not relate to apportionment of payments under cl 6.1 of SPA. Neither does it relate to the refund of deposits under cl 6.2 of the SPA.

[24] The issue at hand is what was agreed by both parties with regards to the assets and liabilities of the companies as at completion of the SPA.

[25] What governs the dispute and the parties' respective rights to the vacant property allowance is the SPA. The defendants in their submission quoted the case of *In-Fusion Solutions Sdn Bhd v UNITAR Capital Sdn Bhd* [2016] 11 MLJ 667; [2015] 1 LNS 280, where Hasnah Hashim J (as she then was) at p 685 held that:

> [48] The contractual relationship of the parties are governed by the terms of the agreement and as such the plaintiff cannot invoke and interpret the provisions of all the agreements according to their whims and fancies.

[26] I agree with the defendants that the contractual relationship between the plaintiffs and the defendants are governed by the terms and conditions of the SPA and neither party can invoke or interpret the provisions of the SPA 'according to their whims and fancies'.

[27] In interpreting a contract between two parties, the Court of Appeal in *Percetakan Kolombong Ria Sdn Bhd v Wawasan Iktisas Sdn Bhd* [2016] 6 MLJ 584; [2017] 4 CLJ 302 held that the court should:

> [28] ...
>
> (a) be entitled to take into account the circumstances surrounding the making of the contract, including the factual matrix that forms the background of the contract;
>
> (b) adopt a common sense approach; and

(c) discover the meaning of the agreement from the words which they have used read in the context of the circumstances in which they made the agreement.

[28] Idrus Harun JCA in delivering the judgment of the Court of Appeal in *Percetakan Kolombong Ria* said:

> [26] ... The essential point is that the court can gauge the meaning of the agreement from the words which the parties have used, the intention of the parties as evinced in the contemporaneous documents or from other relevant facts, taking into account the context of the circumstances which they made the agreement.

[29] Lord Bingham in *Bank of Credit and Commerce International SA v Munawar Ali* [2001] 1 All ER 961; [2002] 1 AC 251 held that:

> In construing a contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words used in their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified (see also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at pp 912–913).

[30] Accordingly, based on the dicta of Idrus Harun JCA in *Percetakan Kolombong Ria* and of Lord Bingham in *Bank of Credit and Commerce International SA v Munawar Ali* [2001] 1 All ER 961; [2002] 1 AC 251 in construing the SPA and in ascertaining the intention of the parties, this court will read the SPA as a whole and will give the words used their natural and ordinary meaning in the context of the SPA. This court will make an objective judgment of the intention of the parties based on the words which the parties have used in the SPA, the parties' conduct and all available contemporaneous documents.

[31] Based on the plain and ordinary reading of cl 5.3.1(b), as at completion date, the purchasers ie the defendants will take over the *business* of the company on 'as is where is basis' free from all assets and liabilities save for the lease and lease property. This fact is not in dispute as the defendants' lawyers in their letter of 4 September 2017 confirmed that:

> Pursuant to Clause 5.3.1(b), the purchaser shall take over the business of the company as at the completion date free from all assets and liabilities whatsoever except as per as stated in the share sale agreement.

[32] What is the vacant property allowance? It is a refund of assessment charges paid by the company to DBKL during the vacant period. It is an

amount owed by DBKL to the company. It is an elementary accounting principle that an amount owing to a company is an account receivable and all receivables are assets and are treated as such on the company's balance sheet. Therefore, the vacant property allowance is an account receivable and accordingly an asset of the company.

[33] As the vacant property allowance is an asset of the company, pursuant to cl 5.3.1(b) of the SPA, the defendants agreed to take the company as at completion date free from the vacant property allowance.

[34] For purposes of analysing the facts that transpired between the plaintiffs and the defendants and the conduct of the parties, I have set-out in the table below the chronology of the time-lines pursuant to the SPA and the interactions between the parties.

CHRONOLOGY OF EVENTS

DATE	EVENT
6 April 2015	Date of SPA.
	Payment of deposit totalling RM2,715,649 by the defendants to the plaintiffs' solicitors as stakeholder.
5 August 2015	Date balance of purchase price due under the SPA.
3 September 2015	The defendants' lawyers issued a cheque to the plaintiffs' solicitors for the balance of the purchase price for the sum of RM8,431,005.50 and a cheque for late payment interest of RM51,741.20.
5 September 2015	Date balance of purchase price due after one month automatic extension under the SPA.
9 September 2015	Meeting between the plaintiffs, the defendants, the plaintiffs' solicitors and the defendants' solicitors.

DATE	EVENT
10 September 2015	Letter from the plaintiffs' solicitors to the defendants' solicitors: (a) referring to the outstanding issues at their meeting on 9 September 2015, which are: (i) 'GST Amount Claimable for period 1 July 2015–1 September 2015' for the amount of RM13,892.85; and (ii) 'DBKL vacant building allowance for assessment and yet to be credited by DBKL' for the periods of first half-year 2014, second half-year 2014 and first half-year 2015 for the estimated amount of RM300,000. (b) confirming that the plaintiffs agreed to accede to the defendants' position that defendants did not have to pay the GST item and the DBKL vacant building allowance until the same are refunded or paid by the relevant governmental authority or body to the company or the defendants.
15 September 2015	The defendants' lawyers forwarded a cheque for the sum of RM237,587.65 being the apportionment payable to the plaintiffs' lawyers.

MONIES PAYABLE BY DEFENDANTS TO PLAINTIFFS PRIOR TO COMPLETION OF SPA

[35] This court finds that on the plain and ordinary reading of cll 4.2.1, 5.3.1(b) and 6.1 of the SPA, the monies payable by the defendants to the plaintiffs' solicitors during the payment period for completion of the SPA are (i) the balance of the purchase price; (ii) the late payment interests; (iii) sums equivalent to all assets less liabilities of the company, and (iv) the apportioned assessment charges, quit rent charges, insurance charges, electricity and water charges etc together with all other rates, taxes, charges and outgoings in connection with the lease and/or the lease property.

[36] Based on the terms of the SPA, the due date for these payments by the defendants, after taking into account the one-month automatic extension, is 5 September 2015. As the facts show, the defendants forwarded the cheque for the balance of the purchase price and the late payment interest on 3 September 2015 and in their cover letter asked for an urgent meeting with the plaintiffs and the plaintiffs lawyers. The parties and their respective lawyers met on 9 September 2015. From the 10 September 2015 letter, which was written a

day after the meeting, it can objectively be concluded that following the meeting, the plaintiffs agreed with the defendants' position that the defendants did not have to pay the GST item and the vacant property allowance on the due date under the SPA. Instead the plaintiffs agreed that the defendants are to pay for these assets after completion namely 14 days after the company or the defendants received the refund from by relevant authorities.

[37] The plaintiffs by their solicitors' letter dated 10 September 2015 agreed to waive their right to receive a sum equivalent to these receivables prior to completion of the SPA and for the defendants to pay them the sum only when the company receives the receivables from the relevant government authority. Clause 13.1 of the SPA expressly states in relation to waivers:

> 13. *Waivers*
>
> 13.1 Waiver of any breach of this agreement or of any right, power, authority, discretion or remedy arising upon a breach or default under this agreement, must be in writing and signed by or on behalf of the party granting the waiver. *No waiver by a party shall be construed as a waiver by such party* of any other breach of this agreement or *of any other right* power, authority, discretion or remedy that such party *may have under this agreement.*

[38] Pursuant to cl 5.3.1(b) of the SPA, the plaintiffs had the right to receive the receivables prior to completion of the SPA since they are assets of the company. The defendants should have paid to the plaintiffs the GST item and the vacant property allowance prior to the completion date as agreed under the SPA.

[39] However, as evidenced by the 10 September 2015 letter, the plaintiffs agreed to the defendants' position that the defendants pay these assets only after the company has received the account receivables from the relevant authorities. The plaintiffs' waiver of their right to receive the GST item and the vacant property allowance prior to completion of the SPA is not a waiver of their right to receive these assets. As expressly stated in the 10 September 2015 letter, the waiver is subject to the condition that the defendants are to keep the plaintiffs informed of the refund or payment by the relevant government authorities and for the defendants to pay the plaintiffs the allowance within 14 days after such refund or payment is made. This is evidenced in the plaintiffs' solicitors letter of 10 September 2015 which state:

> 5. We are instructed that the sellers are prepared to acceded to the purchasers' position that the GST item and assessment allowance item need not be paid by the purchasers to the sellers until the same are refunded or paid by the relevant governmental authority or body to the subject company or the purchasers. Kindly therefore once handover is done, keep us informed of the refund or payment by the relevant governmental authority or body for the GST item and assessment

allowance item and pay to us as the sellers' solicitors the apportionment amount in connection therewith once and in any event within fourteen days such refund or payment is made.

[40] The defendants cite as authority the Court of Appeal in *Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt* [2016] 5 MLJ 220 as authority that their lack of response to the plaintiffs' solicitors letter of 10 September 2015 does not amount to an admission by the defendants that they are liable to pay the DBKL vacant property allowance to the plaintiffs. With respect to defendants' counsel, the case of *Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt* is distinguishable from this present case. That case relates to an appeal after full trial. Hence, the applicability of the Evidence Act 1950. This present case relates to an interlocutory application for summary judgment at the sessions court based on affidavit evidence. The Evidence Act does not apply to affidavits. Section 2 of the Evidence Act 1950 expressly states that:

2 Extent

This Act shall apply to all judicial proceedings in or before any court, *but not to affidavits presented to any court or officer* nor to proceedings before an arbitrator. (Emphasis added.)

[41] Notwithstanding the non-applicability of the Evidence Act to the plaintiffs' application for summary judgment, the Court of Appeal in *Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt* expressly stated that:

Conduct is a relevant fact for the court to take into account to give the relevant probative force to the version of the plaintiff and/or the defendant's case.

[42] If the plaintiffs didn't agree for the defendants to pay the GST item and the vacant property allowance only after the company received the refunds or payment, it follows that completion of the SPA would not have occurred because the defendants had not complied with the terms of the SPA namely that they take the business of the company on completion free from assets and liability save for the lease and lease property.

[43] I find that the defendants' conduct of:

(a) two days prior to the due date of payment of paying just the balance of the purchase price and the late payment interest but not the others monies due and instead asking for an urgent meeting with the defendants;

(b) not disputing the contents of the plaintiffs' solicitors' letter dated 10 September 2015 sent a day after the meeting between the parties, which letter states that the plaintiffs' agree for the defendants to pay to the plaintiffs the GST item and vacant property allowance after the company or the defendants receive the refunds from the relevant authorities;

(c) paying the apportionment due to the plaintiffs a few days later on 15 September 2015; and

(d) taking over the company shortly thereafter,

are relevant facts to take into account to give probative force to the plaintiffs' case.

[44] In my objective judgment, the plaintiffs' conduct in agreeing to waive the payment of vacant property allowance prior to completion of the SPA and the defendants' conduct in not disputing the plaintiffs' waiver as contained in the 10 September 2015 letter and taking over the company prior to the payment of the vacant property allowance, shows that the parties had agreed that defendants are to pay to the plaintiffs the vacant property allowance after completion of the SPA (ie upon the company's receipt of the payment of the allowance from DBKL) instead of prior to completion.

[45] As discussed above, the vacant property allowance is a receivable and thus an asset of the company. The defendant had agreed to take over the company as at completion date free from all assets and liabilities. I find that the defendants' refusal to pay the vacant property allowance, which is a pre-completion asset of the company, to the plaintiffs after having received the allowance from DBKL to be breach of the agreement between the parties.

[46] The law on summary judgment under O 14 r 1 of the Rules of Court 2012 is well settled. As outlined by the Federal Court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, in every application under O 14 once it is established that the claim come within O 14 r 1 and the plaintiff has met the preliminary requirements for proceeding under O 14 as set out in O 14 r 2, the burden shifts to the defendant to satisfy the court that there is an issue or question to be tried with respect to the claim or part thereof.

[47] It is not disputed that the plaintiffs have satisfied the preliminary requirements and that the application comes within O 14. The burden therefore falls on the defendant to satisfy the court that there is a triable issue in relation to the plaintiffs' claim.

[48] It is unfortunate that the defendants' counsel, in trying to persuade this court that there are triable issues in relation to the plaintiffs' claim, chose to muddy the waters by raising red-herrings such as (i) the company and the plaintiffs are separate legal entities — therefore, the plaintiffs are not entitled to the vacant property allowance since it was paid to the company; (ii) the vacant property allowance is an apportionment of charges even though it is clearly a pre-completion asset of the company and (iii) the vacant property allowance is not deposit and therefore is not entitled to be refunded under cl 6.2 of the SPA.

[49] As discussed above, this is a simple case of interpretation of the SPA. Pursuant to basic accounting principles, the vacant property allowance is an asset of the company. It is clear from the plain and ordinary meaning of the SPA, the parties had agreed that the defendants at completion of the SPA would take the business of the company free from all assets and liabilities save for lease and the lease property.

[50] Accordingly, for the reasons discussed above, I find that the defendants have failed to raise any triable issue in relation to the plaintiffs' claim for summary judgment in respect of the payment of vacant property allowance.

DECISION

[51] For these reasons, I allow the plaintiffs' appeal with costs. The sessions court's decision dated 7 March 2017 is set-aside. The plaintiffs' application (encl 7) for summary judgment is allowed with costs of RM10,000 here and below (subject to the payment of the allocator fee).

ORDER

[52] So ordered accordingly.

Appeal allowed.

Reported by Afiq Mohamad Nor